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December 7, 2004

VIA ELECTRONIC FILING
Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, TWB-204
Washington, DC 20554

Re: Ex Parte, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 and WC Docket No. 04-313

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") submits this *ex parte* filing to further address concerns over the impact, role, and interplay between Sections 251 and 271 of the Telecommunications Act of 1996.[1] In the Order and Notice of Proposed Rulemaking, the Federal Communications Commission ("FCC") asked for comments on the interplay between Sections 251 and 271 of the Act and other interrelated issues that had been raised by various parties and incorporated

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the Act," and all citations to the sections of the Act will be to the Act as it is codified in the United States Code.

various petitions, request for waivers, and *ex parte* communications into the proceedings.[2] During the pendency of this proceeding, the FCC issued a *Memorandum Opinion and Order* that granted forbearance from enforcing the 271 requirements of the Act, as it relates to broadband.[3]

The Ratepayer Advocate submits that any order issued in this proceeding must address not only the interplay between Sections 251 and 271 but also the role of Section 10 of the Act (forbearance authority). The Ratepayer Advocate questions whether there is an adequate record to make any findings of national forbearance and, more importantly, whether the FCC's exercise of forbearance authority is permissible under the United States Constitution ("Constitution"). In particular, the Ratepayer Advocate submits that Section 10 of the Act may not be exercised by the FCC because it otherwise violates Article I (separations of power), Article V (equal protection of the law), Articles X and XI of the Constitution for the reasons discussed below.

The Ratepayer Advocate urges the FCC to take care to render a decision that is free from Constitutional defects (*i.e.*, one that does not result in the executive branch of government encroaching on the legislative branch of government). Through Section 251(d)(2)(B) of the Telecommunications Act of 1996 ("1996 Act"), Congress requires incumbent local exchange carriers ("ILECs") to provide access to network elements if competitive local exchange carriers ("CLECs") would be impaired in providing local

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2/ *See I/M/O Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, released August 20, 2004 (referred to as *"NPRM"*). *See NPRM* at ¶¶ 12-14.

3/ *See I/M/O of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petitions for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance 47 U.S.C. § 160(c)*; WC Docket Nos. 01-338, 03-235, 03-260, 04-48, *Memorandum Opinion and Order*, FCC 04-254, released October 27, 2004.

services without such access.[4] *USTA II* assigns to the FCC the responsibility of determining if and in which specific markets, CLECs are impaired.

However, *USTA II* does not authorize the FCC to stray from the clear directives that Congress set forth in the 1996 Act with respect to the states right to regulate intrastate services under Section 2(b) of the Act. The FCC, in applying its administrative expertise to the specific exercise of assessing impairment, should not seek to usurp states' rights and responsibilities (by attempting to preclude states from regulating *intrastate services)* through forbearance petitions filed by telecommunications carriers. Any attempt to use Section 10 of the Act to preclude regulation of intrastate services, whether under Section 271 or any other provision of the Act, must be rejected. Congress, and not the FCC, can only limit the rights of states by rewriting the Telecommunications Act of 1996, if such rewriting is considered necessary by Congress. Indeed, by forbearing from implementing those portions of the 1996 Act that are integral to the legislation's overall objectives, the FCC would upset the carefully crafted balance of power that the Constitution is intended to establish, and thereby violate fundamental Constitutional principles.

Meanwhile, the FCC can avoid these thorny Constitutional issues by clarifying that any decision to forbear only applies to interstate services which are the exclusive jurisdiction of the FCC, but does not implicate or impact the services which are intrastate and subject to state regulation. In the 271 context, that means that states would remain free to regulate items 4-6 and 10 of the checklist items found in Section 271 of the Act with the only restriction being that the rates are to be determined based upon market based

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4/ The 1996 Act states in pertinent part:

> In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether - (A) access to such network elements as are proprietary in nature is necessary; and (B) *the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer*.

47 U.S.C. §251(d)(2) (emphasis added).

rates.[5] Furthermore, neither *USTA II* nor the 1996 Act authorizes the FCC to prevent states from setting rates for intrastate services and from generally exercising their regulatory oversight of intrastate telecommunications services (*e.g.*, inter-carrier relationships, hot cut processes, wholesale and retail service quality).[6]

Under Section 10 of the Act, the FCC can forbear from applying provisions of the Act to a particular carrier or service, "in any or some of its or their geographic markets" if the FCC finds that:

- Enforcement of the provision is not necessary to ensure the charges and practices of a carrier or service are just and reasonable as well as nondiscriminatory;[7]
- Enforcement of the provision is not necessary to protect consumers;[8] and
- Forbearance from application of the provision is in the public interest.[9]

5/ *USTA II*, 359 F.3d at 588-589.

6/ The Ratepayer Advocate notes that the FCC has repeatedly sought input regarding the relationship of the section 271 requirement of the 1996 Act to its Section 251 unbundling framework. In its *Triennial Review NPRM*, the FCC notes that it has long considered the 271 checklist items "to be informative in determining which network elements must be unbundled pursuant to section 251." (*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001) ("Triennial Review NPRM'), at para. 72). In the *NPRM* at ¶ 9, issued in August, the FCC asks "how various incumbent LEC service offerings and obligations, such as tariffed offerings and BOC section 271 access obligations, fit into the FCC's unbundling framework," particularly in light of *USTA II*. Five of the checklist items under section 271 of the Act are relevant to the FCC's unbundling framework. Checklist item number 2 incorporates section 251(c) obligations into the 271 checklist items. Four checklist items require the BOCs to provide competitors with unbundled access to particular network elements: item four requires access to local loop transmission from the central office to the customer's premises; item five requires access to local transport from the trunk side of a switch; item six requires access to local switching; and item ten requires nondiscriminatory access to databases and associated signaling.

7/ 47 U.S.C. § 160(a)(1).

8/ 47 U.S.C. § 160(a)(2).

9/ 47 U.S.C. § 160(a)(3).

In making a determination of whether forbearance is in the public interest, the FCC must consider whether such forbearance will "promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[10] Forbearance is limited in that, except with respect to section 251(f), the FCC may not forbear the application of requirements under section 251(c) or section 271 "until it determines that those requirements have been fully implemented."[11] Finally, a state commission is prohibited from enforcing any provision of the 1996 Act that the FCC has determined to forbear.[12]

The statutory authority outlined in Section 10 of the Act and upon which the FCC is asked to act has Constitutional infirmities that preclude the FCC from exercising and applying this authority under the Act.

THE RULES THAT THE FCC ISSUES RESULTING FROM THIS PROCEEDING SHOULD NOT PREVENT STATES FROM EXERCISING THEIR REGULATORY JURISDICTION OVER INTRASTATE TELECOMMUNICATIONS SERVICES.

Section 271 "checklist" items four, five, six, and ten (loops, transport, switching, and databases and associated signaling) encompass *intrastate* services, and, therefore, states' authority over these services cannot lawfully be eroded by the FCC. Although Congress authorized the FCC to determine whether RBOCs meet the checklist - in order to grant interLATA authority - that authorization in no way precludes states from overseeing the rates, conditions, and service quality of such offerings. Section 271 elements must be offered by the RBOCs in a just, reasonable, and not unreasonably discriminatory manner, as required by Sections 201 and 202 of the 1996 Act. Where the state's actions are consistent with the

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10/ 47 U.S.C. § 160(b). If the FCC finds that forbearance promotes competition among providers then such a finding can be the basis for the determination that forbearance is in the public interest. *Id.*

11/ 47 U.S.C. § 160(d). Subsection C details the administrative procedure by which carriers should file and the FCC should grant or deny petitions for forbearance.

12/ 47 U.S.C. § 160(e).

Congressional intent (to promote local competition), the state actions cannot be declared unlawful or foreclosed by resorting to the forbearance provision of the Act. The FCC is simply precluded from exercising any forbearance authority because such exercise is precluded by Constitutional restrictions, discussed below.

THE FCC'S FORBEARANCE AUTHORITY UNDER SECTION 10 VIOLATES THE SEPARATION OF POWERS DOCTRINE AND THEREFORE MAY NOT BE EXERCISED

The doctrine of separation of powers requires that governmental powers are divided among the legislative, executive, and judicial branches of government, and operates broadly to confine legislative powers to the legislature, executive powers to the executive department, and judicial powers to the judiciary. Each branch of the government is precluded from exercising or invading the powers of another.[13] The separation of powers between branches of government is intended to safeguard liberty by preventing the concentration of too much power in the same branch, thereby establishing a system of checks and balances between the respective branches of government.

The division of powers and responsibilities between these branches is guaranteed by Articles I-III of the Constitution. These "separation of powers" clauses are intended to protect "the whole people from improvident laws." *Chadha* 462 U.S. at 951. As noted by Supreme Court in *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.* 501 US 252 (1991), "[v]iolations of the separation-of-powers principle have been uncommon because each branch has traditionally respected the prerogatives of the other two." *MWAA* at 272.

The legislative branch can delegate to the executive branch the authority to implement the laws made by Congress by issuing administrative rules and regulations, but cannot delegate authority to amend, repeal or modify such laws. The authority to make rules in furtherance of a Congressional enactment is the kind of delegation of legislative authority to an executive agency that is permissible as long as it is consistent with

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13/ Am. Jur. 2d, Constitutional Law §§ 246 other Constitutional standards.[14] However, it is clear that one branch of Government cannot delegate essential functions of that branch to another branch. Stated simply, Congress cannot delegate to an agency the authority to amend, modify or repeal provisions of law adopted by Congress.[15]

Key factors in determining whether a particular statutory provision offends the separation of powers doctrine is whether the enactment involves, implicates, or has the effect and result of a transfer to a branch of government a specific Constitutional power reserved to another branch of government; the extent of the power transferred; whether the transfer of power impinges directly or indirectly on the power of a particular branch of government; and whether the purported transfer of power is accompanied by sufficient protections against the concentration of too much power within that particular branch of government.

Furthermore, permissible delegations of power to an executive body to implement the laws by adoption of appropriate rule is proper and historically such action requires a clear delineation of legislative policy and substantive standards to guide the agency in the implementation of policy, but precise substantive guidelines or standards are not generally required in the promulgation of rules, if adequate procedural safeguards that advance the legislator's purpose and preclude arbitrary, capricious, or illegal conduct by the agency are provided.[16] The adequacy of the procedural safeguards also depends, in part, on whether the nature of the function delegated is legislative or adjudicative in nature.[17] To the extent that the function delegated is legislative, *i.e.*, it involves the promulgation of policies, standards, or rules of general application, then precise procedural safeguards are not Constitutionally necessary.[18] Conversely, to the

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14/ *INS v. Chadha*, 462 U.S. 919 (1983).

15/ See *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct, 3181 (1986) ("*Synar*") (wherein the Supreme Court found that certain provisions of the Balanced Budget and Emergency Deficit Control Act that vested powers found to be executive in the Comptroller General violated the separations of power provisions contained in Article I of the Constitution).

16/ Am. Jur. 2d Constitutional Law § 310.

17/ *United States v. Florida East Coast Railway Company*, 410 U.S. 224, 244-45 (1973); *Uphaus v. Wyman*, 260 U.S. 72, 101 n.8 (1959).

18/ *United States v. Florida East Coast Railway Company*, 410 U.S. at 244-45.

extent that the function delegated is adjudicative in nature, *i.e.*, it involves the determination of rights, duties, and obligations of particular individuals as created by past acts, then procedural safeguards are Constitutionally necessary.[19]

The Courts are also unwilling to provide the legislature unlimited authority to delegate its power. As the Supreme Court has stated in both *WMAA* and *Synar*, there exist checks and balances under the separations of power doctrine that preclude the ability of one branch to assume the authority of another branch or otherwise transfer its fundamental authority to another branch. In the instant matter, Congress specifically vested the FCC with the forbearance authority under Section 10 of the Telecommunications Act of 1996 for the purpose of providing "for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications market to competition."[20] The Ratepayer Advocate submits that the forbearance authority delegated to the FCC by Congress and as implemented to date by the FCC is too far reaching and offends and violates the separations of power provisions of the Constitution. The practical effect of Section 10 of the Act is that the FCC, an executive body, by approval of a petition or by mere inaction on a petition that is filed under Section 10 of the Act, can eliminate, modify, or repeal substantive provisions of the Act without the necessity of having the Congress change, amend, or repeal portions of the Act. This provision can be exercised on a national basis without any necessity to have petitioners join state commissions. Furthermore, the most insidious aspect of this forbearance authority is the ability to divest states of their authority to regulate intrastate telecommunications matters. Under these circumstances, the Ratepayer Advocate submits that the delegation to the FCC of the authority to grant forbearance petitions filed by telecommunications carriers simply runs afoul of the separations of powers doctrine and is an unlawful delegation of legislative function to an executive agency, and is therefore not Constitutional.

19/ *Id.*

20/ H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. (March 1996).

The underlying problem with Section 10 of the Act is that the Congress improperly transferred its fundamental right to make and amend the law to the FCC through the adoption of Section 10 of the Act. Section 10 permits the FCC to effectively eliminate parts of the Act on its own investigation and decision. A distinction must be drawn between a waiver and the broad-brush elimination of regulation accorded by forbearance. A waiver does not affect the statute – rather, it exempts an entity from a specific regulation. Forbearance, by contrast, suspends, modifies, changes, repeals the statute or portion thereof, effectively eliminating and repealing it. Such actions, however, is a power squarely within the province of the legislative branch.

Taken to its logical end, Section 10 permits the FCC to eliminate all Congressionally-enacted laws as it relates to the Act. This violates clearly the Constitutional directive that only Congress may enact, amend and repeal the laws. The Ratepayer Advocate notes that the inherent problems associated with Section 10 of the Act are not new. The potential for problems has been cited by FCC Chairman Michael L. Powell, who said in 1999

> I, too, find something disquieting about Congress delegating broad authority to an independent agency to sweep away a legislative act, particularly where little has changed since the time the legislative act was consummated. But, my discomfort is no greater than that I feel respect to the extraordinarily broad authority we regularly invoke to promulgate rules or expand regulatory coverage beyond the express terms of statutes. Moreover, regardless of our Constitutional concerns with the statute, we are duty bound to comply with clear congressional directives.[21]

Then-Commissioner Powell continued that he "believe[s] that it is quite questionable that a court would find that section 10 to be an unconstitutional delegation of authority, or otherwise contravene the separation of powers . . . ." Mr. Powell cited *J. W. Hampton, Jr. and Co. v. United States*, 276 US 394, 408 (1928), stating, "in order to avoid a delegation infirmity, Congress need only set out an 'intelligible principle to which the person or body authorized [to act] is directed to conform . . . .'" Of course, at the time, Commissioner Powell failed to acknowledge that the Supreme Court had issued its decisions in *WMAA* and *Synar* which highlight that serious separations of powers issues exist. Section 10 suffers from

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[21]/ *I/M/O the Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275: Separate Statement of Commissioner Michael K. Powell, Dissenting*, CC Dkt. No. 98-65 (Aug. 11, 1999).

not only a delegation problem, but also implicates an improper transfer of branch functions to another branch of the government.[22] Section 10 permits the FCC to exercise Section 10 based upon the open-ended standards governing forbearance which for all practical purposes enables the FCC to exercise the authority of the legislative branch to repeal, amend, modify and change the law without having an Act of Congress signed by the President. Congress has, essentially, given the FCC a pen saying, "Rewrite the statute where and when you see fit; cease application of our crafted laws where and when you see fit to do so."

Section 10 directs the FCC to forbear in situations that are described broadly as "not necessary for the protection of consumers" and "consistent with the public interest," leaving the FCC the duty of not simply implementing and enforcing regulations but of also determining where, when, and whether a statute should remain effective, and for whom. These are in essence legislative functions not properly arrogated to an executive agency, even if the legislature has attempted to delegate that authority to itself.

THE PROVISIONS OF SECTION 10(C) OF THE ACT THAT LIMITS THE FILING OF PETITIONS TO TELECOMMUNICATIONS CARRIERS VIOLATES THE FIFTH AMENDMENT OF THE CONSTITUTION IN SO FAR AS DENYING EQUAL PROTECTION AND OTHERWISE INVALIDATES ALL OF SECTION 10 OF THE ACT.

The provisions of Section 10(c) of the Act further compounds the problems associated with Section 10. In particular, the limitations contained in Section 10(c) that permit only telecommunications carriers to file petitions and seek forbearance from the provisions of the Act is on its face a violation of equal protection as afforded by the Fifth Amendment of the Constitution. The practical effect of this provision is to enable a private party to nullify the law and in the case of 271, eliminate the right of states to regulate intrastate services, a right currently protected under the Act and a right that is properly within the reservation of rights afforded by the Tenth Amendment to the Constitution. As discussed further below, such action implicates the Eleventh Amendment, as well. The Congressional action whereby under Section 10(c) Congress has limited the rights to a subset of the public, *e.g.*, telecommunications carriers, as

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[22]/ *See City of New York v. Clinton*, 985 F.Supp. 168, 180 (D.D.C. 1998); *Pinnock v. International House of Pancakes Franchisee*, 844 F.Supp. 574 (1993); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

opposed to any person, simply violates the equal protection clause since no basis has been offered as to why such a limiting provision is justified. The Ratepayer Advocate submits that this provision can not be justified even under the rational basis test normally applied to equal protection analysis. To the extent Section 10, including Section 10(c), enables petitions to be filed by telecommunications carriers, and such petitions can eliminate the rights of states to regulate intrastate services, fundamental rights of states and other citizens are implicated which warrant a stricter standard, if not the highest standard of "strict scrutiny" to otherwise sustain a challenge under equal protection.[23]

Section 10(c) of the Act that limits the applications to only a subset of individuals can only be found Constitutional if sufficient reasons are offered for why it furthers the goals of the Act. based upon the appropriate standard of review. The Ratepayer Advocate submits that in this instance neither the Act nor the FCC has made a case as to why Section 10(c) and its limitations therein are permissible exercise that comports with the requirements of the Fifth Amendment. The FCC has failed to articulate a rational basis for why this section purports to comply with the Constitution and has steadfastly failed even to address the matter or adopt regulations governing the exercise of forbearance authority. To this end, Section 10(c) is facially arbitrary, capricious, and unreasonable since it is limited to telecommunication carriers. The FCC's practice of considering petitions when filed by RBOCs is suspect at best, as exemplified by FCC's requests to comment on the numerous forbearance petitions for which comment was requested in the *NPRM*. The Act was intended to open up local markets that were historically closed to competition. To permit RBOCs under their status as a telecommunications carrier to file petitions to disregard, repeal, change, and modify the marketing opening provisions of the Act lacks a rational basis, let alone the more onerous standards of review applied when fundamental rights are implicated. Although the Supreme Court has recognized

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23/ *See Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (wherein the Supreme Court struck down a provision of the Social Security Law by applying a more strict standard in its evaluation and noting that the Supreme Court's approach to the Fifth Amendment equal protection claims has been precisely the same as to the equal protection claims under the Fourteenth Amendment citing to *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Jimenez v. Weinberger*, 417 U.S. 628, 637 ((1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973) at *Weinberger*, Supra at 638, footnote 2).

that under the rational basis review the court is not to weigh conflicting evidence or empirical data, a rational basis or speculation must form the basis for legislative action which causes disparate treatment among a similarly situated individuals or classes. *F.C.C. v. Beach Communications*, 508 U.S. 307, 113 S. Ct. 2096 (1993).[24] The Supreme Court has found that government action subject to rational-basis scrutiny does not violate equal protection when such action rationally furthers a purpose identified by the provision under review.[25] The FCC has not articulated any legitimate or rational basis or even sought to illuminate why the Congressional creation of this disparate treatment among a similarly situated individuals or classes is justified so as to avoid equal protection claims. The Ratepayer Advocate notes that the Supreme Court has and will overturn government action when the varying treatment of different groups or persons is so unrelated to the achievement of a legitimate purpose that the Supreme Court can only conclude that the government's actions were irrational and will also apply a heightened standard when important rights are involved.[26] The provisions of Section 10(c) are embedded with obvious equal protection issues due to the fact that the petitions now identified in the *NPRM*, which if granted would eliminate state rights to regulate intrastate services under Section 271. For the reasons discussed below, the Ratepayer Advocate submits the provisions of Section 10 (c) violate equal protection even under a rational basis test let alone under a

24/ *See also: Dandrige v. Willaims*, 397 U.S. 471, 484-485 (1970); *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990); *Bowen v. Gilliard*, 483 U.S 587, 600-603 (1987).

25/ *Board of Trustees of University of Alabama v. Garret*, 531 U.S. 356, 121 S. Ct. 955, 148 L.Ed 2d 866.

26/ See *Weinberger*, *supra;* more than the rational basis test applied to review of state laws with respect to the 14th amendment and equal protection *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); *McLaughlin v. Flordia*, 379 U.S. 184 (1964).

higher standard of review and as a result, the entire Section 10 process is defective and cannot be exercised by the FCC.[27]

SECTION 10 OF THE ACT IMPROPERLY INTRUDES ON THE RIGHTS OF STATES UNDER THE TENTH AMENDMENT TO REGULATE INTRASTATE SERVICES COVERED BY SECTION 271 OF THE ACT.

The Ratepayer Advocate submits that Section 10 of the Act as presently interpreted and implemented by the FCC violates the Tenth Amendment of the Constitution in that it seeks to preclude rights reserved to the states which is otherwise inconsistent with the Tenth Amendment. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

The Supreme Court has held that the FCC authority under Section 251 of the Act in relationship to Section 2(b) is not an unwarranted or unauthorized action on part of the FCC and the FCC's powers under Section 251 include the regulation of intrastate services consistent with the provisions of Section 251 of the Act.[28] According to *Iowa Utilities*, such involvement extends to establishing by rulemaking the methodology to be used by the states in pricing unbundled network elements related to intrastate services.[29] No such determination has been made with respect to the role of Section 2(b) and Section 271 of the Act. The limited qualifications (setting a methodology) imposed upon states in *Iowa Utilities* on its face are consistent with Tenth Amendment. However, different issues are involved with respect to the relationship between Section 2(b) and Section 10 of the Act as it applies to both Sections 251 and 271 of the Act. As discussed above, fundamental separation of power questions are implicated which in turn also impact

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27/ *US Const Amend 14. Commission for Layer Discipline v. Benton*, 980 S.W. 2d 425 (Tex. 1998); *Stehney v. Perry*, 101 F.3d 925 (1996). The Ratepayer Advocate, not waiving any argument that the strict scrutiny standard is the only standard to apply when reviewing the appropriateness of Section 10 under the equal protection clause of the Tenth Amendment, submits that even under the most generous test, specifically, the rational basis test, Section 10 offends the equal protection clause.

28/ *See AT&T Corp., et. al. v. Iowa Utilities Board*, et. al., 525 U.S. 366 (1999) ("*Iowa Utilities*").

29/ *Id.* at 378

the rights afforded states under the Tenth Amendment. The Ratepayer Advocate submits that the Tenth Amendments precludes the FCC from using Section 10 of the Act to oust state commission jurisdiction over intrastate services associated with the provisions of Section 271. The issue remains open with respect to Section 251, as well. There are numerous recent cases where the Supreme Court has interpreted the Tenth Amendment and the authority of Congress to subject states to the reach of Federal laws.[30] The Constitutional infirmities discussed herein can be avoided, if the FCC clarifies as part of this *NPRM* that any forbearance only applies to interstate services. Interstate services are subject to jurisdiction of the FCC per Section 2(a) of the Act. Without such clarification, the Ratepayer Advocate submits that Section 10 of the Act is infected with Constitutional infirmities that preclude the FCC from exercising the purported authority granted thereunder.

The Ratepayer Advocate submits that the provisions of Section 2(b) of the Act reflect the underlying protections afforded states under the Tenth Amendment and are merely the Congressional acknowledgment of that relationship. The Ratepayer Advocate submits that Congress may be precluded by the Tenth Amendment to otherwise eliminate Section 2(b) of the Act, if it chose such option in any subsequent rewrite of the Act. As the Supreme Court opined in *Iowa Utilities*, the FCC clearly may adopt rules to implement the Act that overlap and permit the FCC to address intrastate concerns. However, this in no way addresses the issue of whether the FCC may nullify, amend, or change substantive provisions of the statute through the exercise of its forbearance authority with respect to intrastate services. The Supreme Court's reasoning in *Louisiana Pub. Serv. Comm'n. v. FCC*[31], demonstrates the long standing position that Section 2(b) 'fences off' intrastate telecommunications matters from FCC regulation.

30/ *See Printz Sheriff/Coroner, Ravalli County, Montana v. United States*, 521 U.S. 898 (1997); *see also, New York v. United States*, 505 U.S. 144 (1992); *accord Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264,288 (1981); *FERC v. Mississippi*, 456 U.S. 742, 762-766 (1982) (Even where Congress has the authority under the Constitutions to pass laws requiring or prohibiting certain acts, its lacks the power to directly to compel the States to require or prohibit those acts).

31/ *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355 (1986).

SECTION 10 (E) OF THE ACT VIOLATES THE ELEVENTH AMENDMENT TO THE EXTENT THAT ANY ENFORCEMENT ACTION AGAINST A STATE COMMISSION FOR A VIOLATION OF SECTION 10(E) IS PRECLUDED BY THE ELEVENTH AMENDMENT.

The Eleventh Amendment to the United States Constitution provides that:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[32]

The Supreme Court has interpreted it broadly by reaffirming State immunity and has limited the judicial authority of the federal courts. "For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States."[33] This is based on each state being a sovereign entity in our federal system and the inherent nature of sovereignty of not being amenable to suit without its consent.[34] "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity."[35]

In a recent decision, *Federal Maritime Commission v. South Carolina State Port Authority*,[36] the Court held that state sovereign immunity precluded a federal commission from adjudicating a private party's complaint that a state-run port violated a federal act. The Court reasoned "by guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, such as sovereign

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32 / *U.S. Constitution*, Amendment XI.

33/ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) citing *Hans v. Louisiana*, 134 U.S. 1, 15 (1890); *see, also, Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Board*, 527 U.S. 666 (1999); *Hans v. Louisiana*, 134 U.S. 1 (1980); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

34 / *Id.*

35 / *Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.* 506 U.S. 136, 146 (1993).

36 / 535 U.S. 743, (2002).

immunity, we strive to maintain the balance of power embodied in our Constitution and thus to reduce the risk of tyranny and abuse from either party."[37]

The above is fully consistent with the axiom that, under the federal system, the states possess sovereignty concurrent with that of the Federal Government.[38] In very limited circumstances can state sovereignty be limited. The court has recognized several exceptions to the doctrine of sovereign immunity, such as where Congress has enacted legislation pursuant to the remedial provisions of the Fourteenth Amendment;[39] where a state waives its sovereign immunity by consenting to suit;[40] and where a private party sues a state office for prospective injunctive relief or declaratory relied from an on-going violations of the Constitution or federal law.[41] The Ratepayer Advocate notes that Section 10 of the Act contains no expressed provision to the effect that state laws are preempted to the extent forbearance is exercised. As a result, provisions of the Supremacy Clause of the Constitution, Article VI, clause 2, provide no basis for limiting state sovereignty.[42]

Section 10(e) of the Act attempts to foreclose a state commission from applying or enforcing any provision of the Act if the FCC has exercised its forbearance authority. However, nothing in Section 10 of the Act or any other provision of the Act expressly says that the sovereign immunity of states is eliminated, curtailed or otherwise limited in any way. Without such express authorization, there exists no mechanism for the FCC to enforce the limitations contained in Section 10(e) of the Act. For all practical purposes, state commissions could still exercise jurisdiction and apply the Act to the extent intrastate

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37 / *Id.* at 769, citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

38 / *See Tafflin v. Levat*, 493 U.S. 455, 458 (1990).

39 / *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

40 / *See Alden v. Maine*, 527 U.S. 706 (1999).

41 / *See Ex Parte Young*, 209 U.S. 123 (1908).

42 / *See, i.e., Marilyn v. Louisiana*, 451 U.S. 725 (1981) (rejecting preemption of State law by Farm Credit Act of 1971); Tribe L., *American Constitutional Law* § 6-28 at 1175-76 (3d ed. 2000); *Hillsborough County v. Automated Medical Labs. Inc.*, 471 U.S. 707, 717 (1985); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987).

services were involved. Again, this Constitutional issue would be eliminated so long as the forbearance applied only to interstate services. The Ratepayer Advocate urges the FCC to clarify that its forbearance authority regarding 271 is limited to interstate services.

CONCLUSION

As the Ratepayer Advocate thoroughly demonstrated in initial and reply comments submitted in this proceeding, competitive local exchange carriers (CLECs) would be impaired throughout New Jersey's markets absent access to Verizon's unbundled mass market switching. If, despite the comprehensive granular data demonstrating otherwise, and contrary to the Ratepayer Advocate's recommendation, the FCC nonetheless reaches a finding of non-impairment for mass market switching in certain markets, the FCC should only release RBOCs from the statutorily mandated 271 obligations in so far as interstate services are involved. Section 10 of Act simply cannot be used to eliminate and oust the rights of states to regulate intrastate services under Section 271 of the Act. The Constitutional defects discussed above preclude the FCC from exercising Section 10 of the Act at this time or any time. The Ratepayer Advocate submits that Section 10 of the Act violates the separations of powers, the Fifth Amendment, the Tenth Amendment, and the Eleventh Amendments of the Constitution. As a result, the FCC is precluded from applying Section 10 to eliminate the rights of states to regulate intrastate services. The Ratepayer Advocate submits that the Constitutional infirmities associated with Section 10 may be avoided if the FCC concludes that forbearance only applies to interstate services under the Act.

In conclusion, the Ratepayer Advocate submits that the FCC should deny the pending forbearance petitions incorporated into the *NPRM* based upon Constitutional defects in the statute.

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